



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

Nancy Pelosi for Congress and Paul Pelosi)
in his official capacity as treasurer) MUR 6020
Representative Nancy Pelosi)
The Alliance for Climate Protection)

**STATEMENT OF REASONS OF
CHAIRMAN STEVEN T. WALTHER,
VICE CHAIRMAN MATTHEW S. PETERSEN,
and COMMISSIONERS CYNTHIA L. BAUERLY,
CAROLINE C. HUNTER AND DONALD F. McGAHN II**

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Judicial Watch and a *sua sponte* submission by the Alliance for Climate Protection (the "Alliance") pursuant to the Commission's Policy Regarding Self-Reporting of Campaign Finance Violations. *See* 2 U.S.C. § 437g(a)(1); 72 Fed. Reg. 16,695 (Apr. 5, 2007). On April 30, 2009, we rejected the Office of General Counsel's ("OGC") recommendation that (1) we find reason to believe the Respondents violated 2 U.S.C. § 441b(a) by making and accepting a prohibited in-kind corporate contribution resulting from coordinated communications, and (2) that Nancy Pelosi for Congress, and Paul Pelosi in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report an in-kind contribution resulting from coordinated communications.

Even if the advertisements in issue met the payment, content, and conduct prongs of the Commission's coordinated communications regulations, under all the circumstances, the Commission determined that it would not be worthwhile to expend additional Commission resources on this matter. Accordingly, we voted to dismiss this matter in an exercise of our prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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II. DISCUSSION

A. Factual Summary

The Alliance for Climate Protection (the "Alliance") is a domestic non-profit corporation registered in the District of Columbia and organized under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. §501(c)(3)). According to its *sua sponte* submission, in 2007, the Alliance hired the Martin Agency, an advertising agency, to produce a series of advertisements featuring "unlikely pairs" of individuals appearing together "to talk about climate change and the need for action" for Alliance's "We Campaign." At 2. According to the submission, one of the pairs considered for an advertisement included Speaker of the House Pelosi and former Speaker Gingrich, who agreed to appear together to demonstrate their mutual interest in and support of the goals of the "We Campaign." *Id.* at 6.

The submission indicates that Former Vice President Al Gore, founder and Chairman of the Board of the Alliance, first contacted Speaker Pelosi by telephone about possibly appearing in the proposed advertising campaign on February 11, 2008, and she agreed to appear at that time. *Id.* at 7; Conference with Alliance counsel, Oct. 9, 2008. One other "unlikely pair" who agreed and was selected to participate in this particular advertising campaign was Reverend Pat Robertson and Reverend Al Sharpton. *Id.* at 2. The Alliance and the Martin Agency also developed and produced other advertisements for the "We Campaign" during this time period.

According to the Alliance, when Speaker Pelosi agreed to appear in the advertisements, no decisions had been made by the Alliance as to when to run any of the specific "We Campaign" advertisements. *Id.* at 6. Documents provided by the Alliance show that the Martin Agency, acting as an agent of the Alliance, made general media buys for both national print media and national network and cable television in February 2008 before any "unlikely pairs" scripts were written or advertisements produced; the print media buys were made before Speaker Pelosi had been asked to participate in the "We Campaign." *Id.* at 3.

The television buys were for blocks of time and the print media buys were for space rather than for specific advertisements because final, and in some cases even preliminary, decisions on the specific "unlikely pairs" advertisements had not yet been made. *Id.* at 2-3. The Alliance states in its *sua sponte* submission, and documents provided by the Alliance show, that it purchased only national airtime and "did not target the communications to specific states or markets." *Id.* at 6. The *sua sponte* submission states, "[t]he Alliance was responsible for all decisions regarding the production, cost and placement of the ad," as well as all media buys, although its counsel later clarified that the Alliance also delegated authority to the Martin Agency, which "drove the logistics" of and made the decisions regarding actual "ad placement and sequence" within the time slots and spaces already purchased. *Id.* at 6; Conference with Alliance counsel, Sept. 16, 2008.

The Alliance states that it and the Martin Agency communicated with Speaker Pelosi's House leadership office, where Drew Hammill was the primary contact, and did not

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communicate with her district or political staff.¹ *Sua sponte* submission at 9. The Alliance further states that there was no discussion or consideration of politics, Speaker Pelosi's candidacy, or Speaker Pelosi's primary election, and that the communications with Speaker Pelosi's "Leadership office focused solely on the timing of the ad, coordination with [former] Speaker Gingrich's schedule, the content of the script, and other logistical details." *Id.* at 6.

Between February 26 and March 17, 2008, there were a number of email and telephone communications between Hammill and Carol Gordon, a Martin Agency employee, primarily concerning scheduling, although an email dated February 27, 2008 from the Martin Agency to Hammill attached an initial script. After the Martin Agency sent scripts to Speaker Pelosi and former Speaker Gingrich on March 24, 2008, Speaker Pelosi's House leadership office staff suggested revisions to include "more substance about the issue" that were discussed with the Alliance on March 31, 2008. *Id.* at 7. Hammill stated in an email to Gordon on March 31, 2008, that Speaker Pelosi "liked the first script we were shown," but that he anticipated there were some things she would want to change. These changes were included in the script on April 1, 2008.² *Id.* The Martin Agency forwarded the final scripts to Speaker Pelosi and former Speaker Gingrich, and they were approved on April 2, 2008.

The script for the television advertisement, which was filmed on April 3, 2008, is as follows:

[Pelosi]: Hi, I'm Nancy Pelosi, lifelong Democrat and Speaker of the House.

[Gingrich]: And, I'm Newt Gingrich, lifelong Republican and I used to be Speaker.

[Pelosi]: We don't always see eye-to-eye, do we, Newt?

[Gingrich]: No, but we do agree that our country must take action to address climate change.

[Pelosi]: We need cleaner forms of energy and we need them fast.

[Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.

[Pelosi]: Go to wecansolveit.org. Together, we can do this.

The print advertisement featured a photograph of Speaker Pelosi and former Speaker Gingrich sitting together on a small couch in front of the United States Capitol. Speaker Pelosi is identified under the photograph as "Speaker Nancy Pelosi (D)."

¹ Hammill is listed in the Congressional Telephone Book as an employee of the House Leadership Office, but he has also been referred to as Speaker Pelosi's "spokesman" in several news articles regarding election matters. *See, e.g.*, Cindy Sheehan Qualifies to Challenge Pelosi, The Washington Post, Aug. 11, 2008, at A5, available at <http://www.washingtonpost.com/>.

² The Alliance has been unable to locate all of the drafts of the scripts showing these revisions or provide detailed information as to the content of the revisions.

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According to the Alliance, other "We Campaign" television advertisements, which were produced and "in the can" before the Pelosi/Gingrich advertisement, began running on television in early and mid-April. *Id.* at 5; Conference with Alliance counsel, Sept. 16, 2008. The Pelosi/Gingrich advertisement was "rotated in" and broadcast from April 17 through April 30, 2008 (47 days before the June 3, 2008 primary election in Speaker Pelosi's district), and was run at the same time as the Sharpton/Robertson advertisement. *Sua sponte* submission at 8; Conference with Alliance counsel, Sept. 16, 2008. The Alliance states, and email communications provided by the Alliance appear to confirm, that Speaker Pelosi's leadership office was informed that the Pelosi/Gingrich television advertisement would begin running two days before it was first broadcast. Conference with Alliance counsel, Sept. 16, 2008.

According to the Alliance, it decided to run the advertisement again on May 6, 2008, on a number of national networks because it was a "big night" for the Democratic primaries. *Id.* The Alliance hoped the advertisement would catch the attention of "political junkies" of both parties watching the returns and would draw people watching the returns to the "We Campaign." *Id.* The Alliance claims, however, that there was no consideration that the advertisement might draw people watching the returns in Speaker Pelosi's district to vote for her. *Id.*

The Alliance admits to paying for the media buys and production costs of the television advertisement. *Sua sponte* submission at 2-3. Documents provided by the Alliance disclose that the Pelosi/Gingrich advertisements ultimately constituted 12.7% of the aggregated cost of the television advertisements and 6.4% of the aggregated cost of the print media advertisements in comparison to the other advertisements for this phase of the "We Campaign," representing 9.6% of the total amount spent on television and print advertisements.

Since the television advertisement was carried nationally, its broadcast area included Speaker Pelosi's Congressional district in California, where it was broadcast within 90 days of the June 3, 2008 California Congressional primary election in which she was a candidate. Print versions of the advertisement ran in national magazines, including *People*, *Scientific American*, *the New Yorker*, *The Economist* and *Rolling Stone*, whose distribution areas included Speaker Pelosi's Congressional district, between May 5 and May 23, 2008, which was also within 90 days of the primary election.

In their joint response to the complaint, Speaker Pelosi and the Committee state they "understood that the Alliance would comply with all laws and regulations that might affect the content or placement of the ad." At 2. Their response further states that the advertisements were "distributed nationally without targeting the Speaker's district" and that the advertisements "placed her next to a famous Republican who was an anathema to her Democratic primary voters." *Id.* The response further states that neither Pelosi nor the Committee requested or suggested the advertisement or "assented to its distribution in the [Speaker's Congressional] District," and that there was "no discussion of campaign plans, projects, activities or needs." *Id.* at 3.

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B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the "Act"), subjects contributions and expenditures to certain restrictions, limitations, and reporting requirements. *See generally* 2 U.S.C. §§ 441a, 434b. Contributions can be monetary or "in-kind." In-kind contributions include an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," and are subject to the same restrictions and reporting requirements as other contributions. 2 U.S.C. § 441a(a)(7)(A), (B)(i); 11 C.F.R. §§ 100.52(d)(1), 109.21(b). The Commission's regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions from the party paying for such communications to the candidate, candidate's authorized committee, or political party committee which coordinates the communication.³

The criteria for a coordinated communication consist of three prongs – payment by someone other than the candidate or the candidate's authorized committee (or the political party committee, where applicable); satisfaction of one or more content standards; and satisfaction of one or more conduct standards. All three prongs must be met for a communication to be considered coordinated.⁴ 11 C.F.R. § 109.21.

In this matter, even if the advertisement met the coordinated communication standards, it appears to us that under all the circumstances, further pursuit of this matter would not be a prudent use of the Commission's limited resources. Speaker Pelosi agreed to participate in the advertisement months before her primary election, at a time when no decisions had been made about when or where the ads would run. The Alliance selected Speaker Pelosi and former Speaker Gingrich to appear in the nation-wide advertisement because it believed the two would fit into the Alliance's humorous ad campaign featuring "unlikely pairs" allied for a common purpose and would further of its goal of focusing public attention on a policy issue, rather than for any reason pertaining to Speaker Pelosi in her role as a candidate. Accordingly, relative to other matters on our docket, we believe this matter is a low priority and voted to dismiss this

³ In *Shays v. F.E.C.* ("Shays II"), the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.* ("Shays III"), No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).

⁴ The Commission's regulations at 11 C.F.R. § 109.21(g)(2) provide a safe harbor for charitable solicitations that otherwise might constitute coordinated communications. However, because Speaker Pelosi did not solicit any donations to the Alliance in the ads in question, the safe harbor is inapplicable in this matter.

matter and close the file as a matter of prosecutorial discretion.⁵ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

5/8/09.
Date

Steven T. Walther
Steven T. Walther
Chairman

5/11/09
Date

Matthew S. Petersen
Matthew S. Petersen
Vice Chairman

5/7/2009
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Commissioner

5/11/09
Date

Carole C. Hunter
Caroline C. Hunter
Commissioner

5/11/09
Date

Donald F. McGahn II
Donald F. McGahn II
Commissioner

⁵ See MUR 5595, Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub (dismissing as a matter of prosecutorial discretion a "technical violation" of the Act's electioneering communication and disclaimer requirements for a gun show ad referring to the "carry/Kerry permit," where the "primary purpose and effect of the advertisement was to encourage attendance at an upcoming gun show in Indianapolis").